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No. 75-981

IN THE SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1975

GEORGE C. McGEE, Petitioner

v.

COMMISSIONER OF INTERNAL REVENUE

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

REPLY BRIEF TO THE MEMORANDUM FOR THE RESPONDENT IN OPPOSITION

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Point one of the Memorandum For the Respondent in opposition to the Taxpayer's petition includes the erroneous and misleading implication that the James case (366 U.S. 213) involved only a "classic" embezzlement, and not a "kickback," and that "kickbacks" and "embezzlements" are mutually exclusive crimes. The reported opinions in the James case do not explicitly reflect the fact that the James case involved a "kickback," but state, without explanation, that the conduct involved therein constituted embezzlement. However, the unreported Findings of Fact of the United States District Court in James, a copy of which was furnished to the Taxpayer's counsel by the Commissioner, when read in conjunction with the Abstract of Record of

the state court proceedings against James filed with the District Court in James, a copy of which was obtained from the Clerk of the U. S. District Court for the Northern District of Illinois, clearly establish that James was involved with his co-conspirator, Saperstein, in something other than the "classic embezzlement" in Wilcox (327 U.S. 404).

On reply brief and in oral argument before the United States Court of Appeals for the Fifth Circuit, counsel for the Taxpayer stated, without contradiction by the Commissioner, that the James case did involve a kickback. After discovery of the full record in James and its disclosure to counsel for the Commissioner in the Fifth Circuit, Petitioner did not believe that the true, complete facts in James could now be questioned. Therefore, the facts of James were not set forth in the Application for Writ of Certiorari. Petitioner believes the full record of the James case clearly establishes that the James case did involve a "kickback", and consequently, is a controlling authority in the instant case as to pre-1961 years.

A recitation of the complete facts in James would be quite detailed and lengthy since that case involved various criminal acts, including a kickback-embezzlement scheme under the law of the State of New Jersey. This kickback scheme concocted by James and a co-conspirator named Saperstein, an insurance broker, involved union funds paid to Saperstein for transmittal by him (after specified deductions) to an insurance company which was to issue policies to cover union members. Saperstein, in

conspiracy with James and in violation of his fiduciary duty to the insurance company, kickbacked a portion of the funds to James by means of a check made out to the union but mailed to James, who deposited the funds in a false bank account controlled by James. Even though James was not an employee of the insurance company, he was indicted in New Jersey, along with Saperstein, for embezzlement of funds belonging to the insurance company (not just James' union) as a co-principal to the New Jersey crime of embezzlement. The United States District Court in the later tax case found that under New Jersey law James was guilty of the crime of embezzlement of such funds from the insurance company as a principal, along with Saperstein, and of embezzlement of union funds under Illinois law.

Therefore, for the Commissioner in his Motion to now state that James did not deal with a "kickback" scheme, but only with a "classic" embezzlement situation is contrary to the record in James, and misleading to this Court. Moreover, it is also clear that both the Fifth Circuit (Pet. App. A-6) and the Tax Court (Pet. App. B-17) believed that Taxpayer's acts constituted embezzlement under Texas law, thus making James applicable herein.

Respectfully submitted,

S. L. Greenberg

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